1923
April 24.

TORONTO ADMIRALTY DISTRICT

THE LAKES & ST. LAWRENCE TRANSIT CO. ..... } PLAINTIFF;

v.

NIAGARA, ST. CATHARINES & TORONTO RAILWAY CO. ..... } DEFENDANT.

Shipping—Collision—Negligence by failure to use best means provided in view of circumstances immediately preceding accident—Effect of Rules of Railway Board—Error of judgment.

Held, that where the circumstances and conditions existing immediately prior to the time of the happening of a collision suggest extreme caution and promptitude, and effective use of the best means which had been provided for preventing an accident such as occurred was not made, this can not be deemed to be a mere error of judgment, but negligence and want of reasonable forethought must be inferred.

The Rules made by the Railway Commissioners on May 8, 1914, with respect to the passage of vessels through bridges on the old Welland Canal, are not warranted by the terms of sections 30 and 232 of the Railway Act then in force. If they were to be regarded as binding, a breach thereof would not involve a presumption of blame under Canadian Admiralty Law, and the fact that the breach caused or contributed to an accident would have to be proved.

ACTION (in personam) for damages by the plaintiff against the defendant which occurred by reason of the bridge (controlled and operated by the defendant) over the old Welland Canal swinging back while being opened to permit the passage of one of the plaintiff's vessels, and the supervening accident which occurred by reason thereof.

March 21 and 22 and April 14, 1923.

Case now heard before the Honourable Mr. Justice Hodgins at Toronto.

S. C. Wood, K.C. and *G. M. Jarvis* for plaintiff;

D. L. McCarthy, K.C. and *A. J. Reid, K.C.* for defendant.

The facts of the case are set out in the reasons for judgment.

HODGINS, L.J.A. now (April 24, 1923) delivered judgment.

The ship *Lakeport,* 643 tons, laden with block stone, on the 20th April, 1922, made the usual signal for the opening of the defendant's swing bridge, over the old Welland Canal near Thorold. She then, at about 9 a.m. came out of lock No. 24 which was about 1,600 feet from the bridge

and moved south to pass through the bridge opening. According to Harrison, the defendant's engineer, it was customary for ships to proceed as soon as the small highway bridge about 100 feet from lock No. 24 was opened and to go through the opening at the defendant's bridge made by the swing, before it was fully open, and this course was followed here by the *Lakeport*. I have no doubt that till the accident happened everything went on normally and in customary sequence. The bridgetender's evidence as to the usual practice being to open the bridge fully may be true but he had only a very short experience (5 days) and full opening is quite consistent with ships beginning to enter before it is accomplished. It is said by plaintiff's witnesses that the bridge was seen to be entirely open before they left the lock or before they came near the bridge. The master, however, admits, that it stood out a little over the water though not enough to be dangerous in any way. This is the view also of his watchman and assistant engineer, and of a witness Lowe called by the defendants. The bridge was being opened—a slow process on a windy day,—and it is quite possible that as it takes five to six minutes to get to it from the lock, and five to six or eight minutes to open it, the bridge had not quite completed its movement when the ship arrived opposite the first rest pier. The defendants urge that as it was not entirely open the ship took the risk of what might happen, and that in so doing she disobeyed certain rules of the Railway Commission. In order to decide this it will be necessary to determine just what that risk was, and to do this the cause of the accident must be ascertained and its bearing on the ship's action defined. The evidence of the bridge tender, who operated the motor, is in effect that while opening the bridge, and when it was about two-thirds open, a gust of wind struck the arm of it, and stopped its progress; that it stopped, trembled, and then began to go backward. On its stoppage he applied the hand brake, and the wheel brake, but failed to check the backward movement which had then begun, and when he at once put on the rail brake the momentum prevented it from attaching itself to the rail. The bridge consequently

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continued to swing back and struck the ship, doing considerable damage.

If the bridge had been fully open before the ship reached it then instead of being clamped by the rail brake (as usual) that brake must have failed to hold it against the wind. The evidence of the helper on the bridge is pointed to by the plaintiffs as being corroborative of this theory because he says he was struck on the head and stunned by the capstan bar which was snatched in some way out of his hand, and after revolving away from him hit him on the back of the head. I do not attach much importance to his evidence as his injury rendered him unconscious, and he is hardly a trustworthy witness as to how it all happened.

The conclusion I have come to on the whole evidence is that the bridge was not fully open when the ship began to pass it, and that what happened occurred substantially as the bridge-tender relates.

The question is whether negligence caused the accident, and if so whose negligence was it, and what was its effect.

The weather on the day in question was stormy, and the wind, which was west, is stated by Harrison, the defendant's engineer, to have had a velocity of about 80 miles an hour about half an hour after the accident. The weather reports at Buffalo show a velocity diminishing that morning to 57 from 65 miles. But Buffalo is an exceptionally windy place. The witness who gave these figures thought 25 per cent should be deducted from them to arrive at Welland Canal force. The master of the ship puts it at 30 to 35 miles an hour, and he is corroborated by the master and wheelsman of the *Iselin*, which was tied up in the canal that day, and by his own officers.

But conditions did not appear to be so bad, if the actions of both parties are considered, as to cause either the bridge-tenders or the master of the ship any apprehension, at all events, none sufficiently strong to make them take extra precautions. These might have been, on the part of the bridge-tender, sending for extra help or signalling a warning with the flags kept for that purpose, or, on the part of the master, waiting for a lull, or till the bridge was swung clear. This is important as indicating that neither side anticipated any disaster. It is to be noted that almost all

the witnesses speak of the wind not as being gusty, but rather as being strong, and as it appears that two ships had been locked through the bridge earlier in the morning, this disposes of the excuse that an extra man was needed to assist on the bridge. The bridge-tender seems to have thought, and so expressed himself before me, that if it was safe for the oncoming ship it was safe for him.

The bridge is equipped with what is called a rail brake, in addition to a hand and wheel brake. When the bridge is open the ends reach over, but are not in contact with what are called the "rest piers," locks on which are non-existent. Steadiness is secured by clamping this rail brake down upon the rail when the bridge is fully opened, and this is kept set until it is time to close the bridge again. It affords the only real provision for stability, the other brakes not being depended upon for either final action in holding the bridge open or as in any way superseding the use of the rail brake in accomplishing the locking of the bridge. The latter had been used during the five days since navigation opened but only to hold the bridge open and not to do so while the bridge was moving. It is upon the use made of this rail brake that the case should turn. Ward, the electrician of the defendants at St. Catharines, who on the 15th April, 1922, instructed the bridge-tender, says that the rail brake would stop all motion. The defendant's engineer Harrison testified that it was sufficient even against a wind of 80 miles an hour. According to the bridge-tender operating the motor, and who had little experience in this kind of work and began his employment there five days before, his opportunity to use it effectively was defeated by the backward motion of the bridge when caught by what he thought was a gust. But this excuse must be tested by the conditions existing then. These were, to sum them up shortly, that while two vessels had already passed through safely during that morning when the wind was stronger, the wheel of the motor slipped on the track when the bridge started to open for the *Lakeport,* that there was great difficulty in making headway against the wind, that there was an oncoming vessel, and the final pause and trembling of the bridge. These were enough to have suggested extreme caution and promptitude when the motor ceased to be able to shove the bridge

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forward. They demanded the use at once of the best and surest means of holding the bridge and preventing it slipping. The use by the bridge-tender of the hand brake, and the wheel brake, resulted in just enough loss of time to miss the effectual stoppage and locking of the bridge by the rail brake. Under ordinary conditions this might be classed as an error of judgment, but having regard to the considerations I have enumerated it amounts to negligence and want of reasonable forethought from which the entire consequences flowed.

But the defendants contend that the ship broke the rules made by the Board of Railway Commissioners on May 8, 1914, one of which reads as follows:

No . . . . . vessel shall pass through the bridge until the swing or draw is fully open.

Under sections 30 and 232 of the Railway Act this rule must be read as meaning, in order to be within the powers conferred on the Railway Board, that

No vessel shall *be permitted to pass*

etc., as the sections deal wholly with the operation of the bridge and are not intended to govern the navigation of the canal past such obstructions as this swing bridge, etc. They indicate a change of the law since *Turner v. G.W. Ry. Co.* (1) was decided in 1857. Even if the rule was effective and there was a breach there would be no presumption of blame under Canadian Admiralty Law, and the fact that the breach caused or contributed to the accident would have to be proved, and it is not proved here. See *Fraser* v. *SS. Aztec* (2), and *Geo. Hall Coal Co.* v. *SS. Parks Foster* (3).

The regulations issued by the Department of Railways and Canals for the guidance of ships navigating the canals pursuant to R.S.C., c. 115, s. 10, contain the following:—

21. At least half a mile before a vessel reaches any lock, or swing-bridge, a steam whistle, bell or horn shall be sounded as an approach signal from the vessel; provided, however, that such signal shall be given to such extent only as, in the opinion of the Superintending Engineer, or Superintendent, is necessary to give the lockmaster or bridge-tender timely warning to make preparation to receive the vessel at the lock, or to allow it to pass through the bridge opening. Any violation of these provisions shall subject the owner, or person in charge of such vessel to a penalty of not less than two dollars and not exceeding twenty dollars.

(1) [1857] 6 U.C. C.P. 536.

(2) [1920] 19 Ex. C.R. 454, at p. 467-8.

(3) [1923] Ex. C.R. 56-63.

22. (*a*) It shall be the duty of every master or person in charge of any vessel on approaching any lock or bridge to ascertain for themselves by careful observation, whether the lock or bridge is prepared to allow them to enter or pass, and to be careful to stop the speed of any such vessel in sufficient time to avoid a collision with the lock or its gates, or with the bridge or other canal works; any violation of this regulation shall subject the owner or person in charge of such vessel to a penalty of not less than five dollars and not exceeding one hundred dollars.

The bridge-tender is subject to the directions of the Superintending Engineer, and I find that on September 20, 1912, he issued the following instructions:—

NOTICE TO BRIDGE-TENDERS

WELLAND CANAL

Bridge-tenders are to bear in mind that it is difficult to manoeuvre vessels navigating the canal, and when from any cause, it is found that a bridge cannot be operated, they are to quickly display, where it can be readily seen by the Master of an approaching vessel, a red flag during the daylight, and a red lantern at night, to warn him that the bridge cannot be opened.

W. H. Sullivan,
Superintending Engineer.

Welland Canal Office,
St. Catharines, Ont.,
September 20, 1921.

What is the bearing of these rules upon the action of the plaintiff's ship having regard to my finding? Is it that the master of the *Lakeport* should have reasonably foreseen such an occurrence as happened so as to make his action negligent in entering the area over which the bridge swung before it was fully open? I am unable to reach that conclusion. It was fairly to be assumed, I think, by the master that the operation, then almost completed, would be finished, and that the appearances were sufficient to lead him to think so. The wind had not up to this point stopped the swing—indeed the very swinging of the bridge almost to the parallel position indicated that all would be well. No signals warned him, and what finally caused the disaster was the neglect to promptly use the thing provided to lock the bridge at any point, so as to avoid the very accident that happened. This the master could not in my judgment reasonably foresee or apprehend.

The result is that there must be judgment for the plaintiffs for damages, and a reference to the Registrar at Toronto to assess them, with costs of the action and reference.

Judgment accordingly.